FILE COPY

In the Supreme Court

OF THE

United States

Office - Supreme Court, U. S.
FILED
JAN 22 1946
CHARLES ELMORE CROPLEY

OCTOBER TERM, 1945

No. 428

EL DORADO OIL COMPANY and EL DORADO TERMINAL COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GENERAL AMERICAN TRANSPORTATION COMPANY, et al.

Appellees.

Appeal from the District Court of the United States for the Northern District of California.

BRIEF FOR APPELLANTS.

W. F. WILLIAMSON,
310 Sansome Street, San Francisco 4, California,
Counsel for Appellants.

WILLIAM B. MEAD,
WILLIAMSON & WALLACE,
310 Sansome Street, San Francisco 4, California,
Of Counsel.

Subject Index

	Page
Jurisdiction	1
Opinion of District Court	2
Statement of the Case	2
Issues Involved	7
Specification of Errors	8
Argument	9
I. An order of the Interstate Commerce Commission discontinuing a proceeding that in effect purports to make "authoritative" findings of fact and to establish rules of law involving property rights is reviewable under the Urgent Deficiencies Act	9
II. The Interstate Commerce Commission in its order failed and refused to make a proper investigation under Section 15 (13) of the Interstate Commerce Act and attempted an unlawful exercise of authority	13
III. The Commission's conclusion that an allowance to the Oil Works by the rail carriers or by the Tank Car Company under the agreement in excess of the car rentals would be unjust and unreasonable and would unduly prefer the Oil Works as a shipper of its commodities was entirely without support in the evidence and was arbitrary	16
Conclusion	17
Appendix "A"—Interstate Commerce Act, Section 15 (13).	

Table of Authorities Cited

Cases

	Pages
American Federation of Labor v. National Labor Relations Board, 308 U. S. 401, 84 L. Ed. 347	12
Columbia Broadcasting System v. U. S., 316 U. S. 407, 86 L. Ed. 4563	12
Eastern Central, etc. v. U. S., 321 U. S. 194, 88 L. Ed. 668	11
Ellis v. I. C. C., 273 U. S. 434	15
General American Tank Car Corp. v. El Dorado Terminal Co., 308 U. S. 422	5, 10, 13
Interstate Commerce Commission v. Louisville & Nashville R. Co., 227 U. S. 88	17
Mitchell v. U. S., 313 U. S. 80	11
Ohio Bell Tel. Co. v. Public Utilities Com., 301 U. S. 292, 81 L. Ed. 1093	17
Procter & Gamble Co. v. U. S., 225 U. S. 282	11
Rochester Telephone Corp. v. U. S., 307 U. S. 125, 83 L. Ed. 1147	11
St. Louis & O'Fallon R. Co. v. U. S., 279 U. S. 461, 73 L. Ed. 798	11

Statutes

Act of October 22, 1913, c. 32, 38 Stat. 219 (28 U.S.C. 41, subd. (28) 43, 45) c. 32, 38 Stat. 220	1, 7, 9
Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (28 U.S.C. 44)	2
Elkins Act (49 U.S.C. 41)	5
Interstate Commerce Act:	
Section 2	16
Section 15 (13)	2, 6, 7, 10, 14, 15
Judicial Code, Section 210 (38 Stat. 220, 28 U.S.C. 47a)	2
Judicial Code, Section 238, as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, par. (4), 28 U.S.C. 345)	2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1945

No. 428

EL DORADO OIL COMPANY and EL DORADO TERMINAL COMPANY,
Appellants,
vs.
THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GENERAL AMERICAN TRANSPORTATION COMPANY, et al.
Appellees.

Appeal from the District Court of the United States for the Northern District of California.

BRIEF FOR APPELLANTS.

JURISDICTION.

1. The final decree of the Three Judge District Court organized pursuant to the Urgent Deficiencies Act (38 Stat. 219; 28 U.S.C. Secs. 41 (28) and 43-46, inclusive) was entered on April 9, 1945.

2. The petition for appeal was presented to and allowed by the said District Court on June 1, 1945. The record on appeal was filed within the time allowed by law. (R. 42, 43.)

3. The jurisdiction of this Court is invoked under Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, par. (4).; U.S.C., Title 28, Sec. 345) and Section 210 of the Judicial Code (38 Stat. 220, 28 U.S.C. 47a).

4. This Court on October 15, 1945, entered its order noting probable jurisdiction and transferring the case to the summary docket. (R. 267.)

OPINION OF DISTRICT COURT.

The opinion below is reported in 59 Fed. Supp. 738.

STATEMENT OF THE CASE.

This action was brought by appellants (plaintiffs below) under the Urgent Deficiencies Act to annul and set aside an order of the Interstate Commerce Commission dated April 10, 1944, in a proceeding entitled "Allowances for Privately Owned Tank Cars" and numbered 28,515 in the files of the Commission. (R. 1.) The action was based on the grounds that the Commission had no constitutional power to proceed as it did; that it exceeded its statutory authority and did not comply with the plain provisions of Section 15 (13) of the Interstate Commerce Act (see Appen-

dix A), and that its findings were not supported by proof and there was no evidence whatever to support those findings. (R. 1-5.)

The United States, the Interstate Commerce Commission, The General American Transportation Corporation and some eighty-eight (88) railroads filed answers opposing the complaint of appellants. (R. 6, 11, 22, 29.)

Thereafter, the Three Judge District Court on April 9, 1945, issued its final decree dismissing the action and denying the relief prayed for by plaintiffs on the ground of want of jurisdiction. (R. 40.)

The El Dorado Oil Works, appellant, is engaged in extracting coconut oil from copra in plants at Berkeley and Oakland, California. On September 28, 1933, El Dorado Oil Works entered into an agreement with General American Tank Car Corporation, predecessor of respondent, General American Transportation Corporation (hereinafter called the Car Company) under which the Car Company leased to the El Dorado Oil Works 50 tank cars at a monthly rental of $27.50 per car. (R. 52, 54.) The Oil Works also agreed to take and the Car Company further agreed to supply the Oil Works with such additional tank cars as it might need at a monthly rental of $30.00 per car. (R. 54, 55.)

The agreement required the Car Company to collect all mileage earned under applicable railroad tariffs by the cars covered by the agreement and each month to credit to the rental or service account of El Dorado Oil Works all mileage earned by said cars while in the service of the Oil Works. (R. 52, 55-56.)

The cars were used by the El Dorado Oil Works for the transportation of its coconut oil in interstate commerce from Berkeley, California, principally to eastern points.

The tariffs of the carriers, though containing a general provision for the payment of 1½ cents per car per mile, both loaded and empty, for the use of tank cars of private ownership, provided for the payment of mileage only to the party whose reporting marks appeared on the cars, and for a portion of the period covered by the car lease agreement, stipulated that no payment would be so made to car lessees. (R. 110-120.)

Up to July, 1934, the Car Company collected the mileage allowance of 1½ cents per car mile set forth in the carriers' tariffs, and pursuant to its agreement paid them to the Oil Works. From that time on the Car Company refused to pay to the Oil Works any part of the said mileage allowances so collected by it, in excess of the monthly rental reserved in the agreement, although the Car Company continued to receive the full mileage allowances from the carriers.

In June, 1935, the El Dorado Terminal Company, as assignee of its parent company, the El Dorado Oil Works, brought suit against the Car Company in the United States District Court for the Northern District of California, Southern Division, to recover the amount so collected as mileage earnings and retained by it, accrued from the use by the Oil Works of the leased cars up to May 31, 1935. (R. 43, 49.) These earnings amounted to $23,540.79 and had been collected by and retained by the Car Company. The Car Com-

pany denied liability on the ground that payment by it of mileage received in excess of the car rental paid by the Oil Works would constitute a rebate from published transportation rates in violation of the Elkins Act. (49 U.S.C. 41.) Judgment for the Car Company was rendered by the District Court but was reversed on appeal by the Circuit Court of Appeals. (104 Fed. (2d) 903.) The Supreme Court granted certiorari and in *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422, held that an administrative question within the jurisdiction of the Commission being involved, the District Court should have stayed its hand pending the Commission's determination of the administrative question.

The Oil Works and the Terminal Company thereafter petitioned the Commission to cause an investigation to be made of the questions involved and the practices disclosed by said action in the District Court. (R. 43.) By order, dated July 24, 1940 (R. 241), the Commission instituted an investigation upon its own motion to determine:

> (1) Whether the practices involved under the terms and operations of the lease contract are unlawful in violation of the Interstate Commerce Act;
>
> (2) Whether a reasonable charge or allowance may be paid, and, if so, the amount thereof as a maximum to be paid, by the carrier or carriers by railroads for the use of the tank cars furnished such carriers by petitioners for the transportation of the products of petitioners in interstate com-

merce from Berkeley and Oakland, Calif., in the period July 1, 1934, to December 31, 1936; and

(3) What findings shall be made, or what rules, regulations or practices shall be prescribed, or what orders shall be entered to remove any unlawfulness that may be found to exist.

The Commission thereafter made a determination to the effect that any payments by the Tank Car Company to the Oil Works pursuant to the said agreement in excess of such car rentals are unjust and unreasonable and constituted an unlawful preference or rebate to the Oil Works as a shipper, contrary to the Elkins Act. (R. 237.) After making the said determination, the Commission discontinued the proceedings by an order dated April 10, 1944. (R. 260, 261.)

Thereafter and in due time plaintiffs filed with the Commission an application for rehearing, re-argument and reconsideration of the matters covered by the said order of the Commission and particularly averred that the said order was incomplete, inadequate and erroneous, that it was contrary to the evidence and unsupported by any evidence; that said order constituted an usurpation of the province of the District Court in excess of the jurisdiction and authority of the Commission; also that the Commission had failed in said order to make findings on a material question as to what is a reasonable and uniform allowance to be made by Interstate Carriers to the furnishers of tank cars as a class as provided in Section 15 (13) of the Interstate Commerce Act; that its conclusions were not

supported by findings of fact and that erroneous principles of law were applied by the Commission in its decision and order. The said application for rehearing, re-argument and reconsideration was denied by order of the Commission on July 31, 1944. (R. 261.)

ISSUES INVOLVED.

(1) The decision of the Three Judge District Court in this case sanctions the exercise by the Commission of judicial powers vested in the District Court in the pending action of assumpsit of which action the District Court has complete jurisdiction. Such decision is contrary to the express provisions of the Act of October 22, 1913, c. 32, 38 Stat. 219 (28 U.S.C. 41, Subd. (28)), and in effect divests the District Court of its authority to determine the pending action of assumpsit.

(2) The order of the Commission challenged in this case purported to decide that payment by the Tank Car Company to the Oil Works in accordance with its agreement would amount to a rebate or discrimination prohibited by the Elkins Act. The authority of the Commission under Section 15 (13) of the Interstate Commerce Act is limited to a determination of what is a just and reasonable allowance to be made by carriers to shippers or others furnishing facilities or services to the carriers which compensation must be just and reasonable, uniform as to all who furnish the services and embodied in the approved and published

tariffs of the carriers. The Commission, however, refused to determine what would be a just and reasonable allowance with uniform application by stating, "we cannot tell how far-reaching the investigation would have to be". (R. 249.)

(3) The Commission's conclusion that the allowance by the carriers or the Tank Car Corporation to the Oil Works in excess of the car rentals paid under the terms of the car lease agreement, was unjust and unreasonable and unduly preferred the Oil Works to the extent that it exceeded the rentals, was not supported by any evidence and was directly contrary to all of the evidence and was arbitrary. The Commission lacks power to make findings or conclusions unsupported by any evidence and resting solely on a prior decision of the Commission in an entirely different proceeding.

SPECIFICATION OF ERRORS.

(1) The Three Judge District Court erred in dismissing the complaint of plaintiffs for want of jurisdiction. (R. 42.)

(2) The Three Judge District Court erred in denying the relief prayed for in the complaint of plaintiffs. (R. 42.)

ARGUMENT.

I.

AN ORDER OF THE INTERSTATE COMMERCE COMMISSION DISCONTINUING A PROCEEDING THAT IN EFFECT PURPORTS TO MAKE "AUTHORITATIVE" FINDINGS OF FACT AND TO ESTABLISH RULES OF LAW INVOLVING PROPERTY RIGHTS IS REVIEWABLE UNDER THE URGENT DEFICIENCIES ACT.

The Three Judge District Court, organized under the Urgent Deficiencies Act, Act of October 22, 1913, c. 32, 38 Stat. 219 (28 U.S.C. 41, Subd. (28) 43, 45), had full and complete jurisdiction to annul and set aside the order of the Interstate Commerce Commission (R. 260, 261) that was subjected to attack by the complaint of plaintiffs (appellants). (R. 1-5.) The order of the Commission, although in form a discontinuance of an investigative proceeding, in effect was an attempt by the Commission to make "authoritative" findings of fact and conclusions of law (R. 237-250), with respect to the action of assumpsit between appellants and intervenor, Car Company, then and now pending in the United States District Court.

The order of the Commission is subject to review under the express terms of the Urgent Deficiencies Act, Act of October 22, 1913, c. 32, 38 Stat. 219 (28 U.S.C. 41, Subd. (28)), which provides:

> "Setting aside order of Interstate Commerce Commission. Twenty-eighth. Of cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission."

The Three Judge District Court erroneously disclaimed jurisdiction to set aside or annul the order of the Commission by sacrificing substance to form. Because the order of the Commission, in form, discontinued the proceeding, the Court erroneously concluded no order existed that could be set aside.

The opinion of the District Court illustrates the theory on which it proceeded, and as we contend, erroneously.

> "By its finding and determination with respect to the practice here involved, the Interstate Commerce Commission made no decision which required any party to the proceeding before it to do or not to do any specific act. It followed the directions of the Supreme Court (*General American Tank Car Corp. v. El Dorado Terminal Co.*, supra) *and determined, under the Interstate Commerce Act, the lawfulness and reasonableness of the practice which had obtained between plaintiff and the tank car company.* When this was done its job was done. It was not required to make any order and made none, and having completed its work, stamped 'finis' thereon and discontinued the proceeding." (R. 35.)

It is obvious that the Commission could not have performed its duty under Section 15 (13) of the Interstate Commerce Act as it was directed so to do by the Supreme Court in *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422, if in fact the Commission made no order. If, however, the Commission, by its findings and order, passed upon the issues before the District Court in the original assumpsit

action, either judicially or in an advisory capacity, it usurped the jurisdiction of that Court. The order of the Commission, by whatever name it is designated, is in its nature an effort by the Commission to decide the controversy between appellants and the Car Company in the pending action of assumpsit.

The administrative action of the Commission is subject to judicial review unless it falls within an excepted classification. (*Eastern Central, etc. v. U. S.*, 321 U. S. 194, 88 L. Ed. 668; *St. Louis & O'Fallon R. Co. v. U. S.*, 279 U. S. 461, 73 L. Ed. 798.) Since the decision of this Court in *Rochester Telephone Corp. v. U. S.*, 307 U. S. 125, the basis of reviewability of administrative action has been concerned with the substance of what was done or sought to be done rather than with technical form. Similarly, in *Mitchell v. United States*, 313 U. S. 80, this Court said:

> "The fact that the Commission's order was one of dismissal of appellant's complaint did not foreclose the right of review. Appellant was an aggrieved party and the negative form of the order is not controlling." (p. 92.)

The cases relied upon by the lower Court and cited in its opinion as authority for its decree are premised upon the "negative order" doctrine that was set at rest by the decision in the case of *Rochester Telephone Corp. v. U. S.*, supra. The case of *United States v. Griffin*, 303 U. S. 226, relied upon by the lower Court, was decided upon the authority of *Procter & Gamble Co. v. U. S.*, 225 U. S. 282, which latter case was overruled and its "negative order" doctrine expressly

repudiated by *Rochester Telephone Corp. v. U. S.*, supra.

The other cases relied upon by the lower Court, e.g., *United States v. Illinois Cent. R. Co.*, 244 U. S. 82; *Delaware & Hudson R. Co. v. United States*, 266 U. S. 438, and *United States v. Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, involved orders of a preliminary or procedural character that in no sense purported to be final adjudications of substantive rights such as the order attacked here.

The reviewability of an order is not to be determined by its form. (*American Fed. of Labor v. National Labor Relations Board*, 308 U. S. 401, 408, 84 L. Ed. 347.) In *Mitchell v. U. S.*, 313 U. S. 80, the Supreme Court held that an order of dismissal, though negative in form, does not foreclose the right of judicial review. Again, in *Columbia Broadcasting System v. U. S.*, 316 U. S. 407, the Supreme Court announced that the label placed upon an order by the Commission is not conclusive and that an order that in effect penalizes or injures a party, is reviewable.

II.

THE INTERSTATE COMMERCE COMMISSION IN ITS ORDER FAILED AND REFUSED TO MAKE A PROPER INVESTIGATION UNDER SECTION 15 (13) OF THE INTERSTATE COMMERCE ACT AND ATTEMPTED AN UNLAWFUL EXERCISE OF AUTHORITY.

The proceeding before the Commission that culminated in the order under attack was instituted by the Commission on its own motion, following the filing of a petition by appellants, as a result of the decision of the Supreme Court in *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422. In that case, the Supreme Court directed the District Court before which the original assumpsit action was pending to stay its hand pending a determination by the Interstate Commerce Commission of the administrative question involved.

The Supreme Court in *General American Tank Car Corp. v. El Dorado Terminal Co.*, supra, upheld the validity of the car leasing agreement (the identical contract involved here) and held that the Oil Works (appellant here) having furnished the cars was therefore entitled under the "plain provisions of Section 15 (13)" to receive the compensation provided by the Act, but that as the published tariffs specified allowances would be paid only to the person whose reporting marks were on the cars, and the Oil Works, as lessee, did not have its reporting marks upon the cars, it was not entitled under the existing tariffs to demand the mileage allowances from the carriers. The Court also clearly indicated that there was no legal inhibition against making a profit and held that the Commission

is required to ascertain after a full investigation a fair and reasonable compensation and prescribe a uniform rate to be paid to the furnisher, whether owner or lessee, of a service or facility.

The Commission was therefore required to determine after investigation what is a just and reasonable allowance to be made by carriers to shippers or others furnishing facilities or services to the carriers which compensation must be just and reasonable, uniform as to all who furnish the services and embodied in the approved and published tariffs of the carriers. Section 15 (13) of the Interstate Commerce Act (49 U.S.C.)

The report and order of the Commission of April 10, 1944, not only failed to determine the administrative questions but assumed in excess of its constitutional and statutory authority to decide the civil action in assumpsit pending before the District Court.

The Commission did not determine as required under the provisions of Section 15 (13) of the Interstate Commerce Act what was a just and reasonable compensation to be paid by the carriers to the furnishers of tank cars uniformly as a class. Instead it deliberately avoided that subject with the statement "were we to attempt to determine the reasonableness of allowances for a 'class' of tank cars such as these, we cannot tell how far-reaching the investigation would have to be". (R. 249.)

The effect of the Commission's findings and order is to deny to appellants the right to recover under the

lease contract and to permit the Tank Car Corporation to retain the mileage which it had collected from the carriers as mileage allowances for the tank car facilities furnished by the appellants, notwithstanding the provisions of the statute that such allowances could be paid to and were only authorized for the benefit of the furnishers of the facilities.

The Commission by its order assumed that its decision was ancillary to the pending assumpsit action and that it "authoritatively" determined the amount of the allowance payable to the shipper (appellants) in that action. This was an unconstitutional assumption of authority on the part of the Commission and in excess of the authority conferred by Section 15 (13) of the Interstate Commerce Act. (*Great Northern Railway Co. v. Merchants Elevator Co.*, 259 U. S. 285; *Ellis v. I.C.C.*, 237 U. S. 434.)

The Supreme Court in *General American Tank Car Corp. v. El Dorado*, supra, held that the District Court had jurisdiction of the assumpsit action, but that decision did not assume to either enlarge or reduce the statutory duty of the Commission.

The order of the Commission having failed to establish just and reasonable compensation to be allowed uniformly to furnishers of tank cars as a class and being solely designed to "authoritatively" decide the pending assumpsit action, should be set aside and annulled.

The order of the Commission, if permitted to stand, would render the carriers unable to establish and

publish a uniform allowance as contemplated by Section 15 (13). The payment by the carriers of variable rentals would be in violation of Section 2 of the Interstate Commerce Act. This would impose the burden on the carriers to determine in each instance the amount paid or payable by a shipper-lessee for each tank car furnished the carriers and be not only an insuperable burden for the carriers but would open the door for the preferences and discriminations prohibited by the Interstate Commerce Act.

III.

THE COMMISSION'S CONCLUSION THAT AN ALLOWANCE TO THE OIL WORKS BY THE RAIL CARRIERS OR BY THE TANK CAR COMPANY UNDER THE AGREEMENT IN EXCESS OF THE CAR RENTALS WOULD BE UNJUST AND UNREASONABLE AND WOULD UNDULY PREFER THE OIL WORKS AS A SHIPPER OF ITS COMMODITIES WAS ENTIRELY WITHOUT SUPPORT IN THE EVIDENCE AND WAS ARBITRARY.

The evidence shows without conflict that on all movements of the leased cars the carriers had received the full freight to which they were entitled under the applicable tariffs. The uncontradicted evidence shows that the freight was paid by the consignees, hence no rebate in freight could have been received by the Oil Works. (R. 122.)

This Court has consistently adhered to the rule that a finding unsupported by any evidence or contrary to the evidence is arbitrary and baseless. (*Interstate*

Commerce Commission v. Louisville & Nashville R. Co., 227 U. S. 88; *Ohio Bell Tel. Co. v. Public Utilities Com.*, 301 U. S. 292, 81 L. Ed. 1093.)

CONCLUSION.

The final decree of the Three Judge District Court is contrary to the express provisions of the Urgent Deficiencies Act and the decisions of this Court and should be reversed with directions to annul and set aside the order of the Interstate Commerce Commission of April 10, 1944.

Dated, San Francisco, California,
January 16, 1946.

Respectfully submitted,
W. F. WILLIAMSON,
Counsel for Appellants.

WILLIAM B. MEAD,
WILLIAMSON & WALLACE,
Of Counsel.

(Appendix Follows.)

Appendix

Interstate Commerce Act, Section 15-(13):

"If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section." Act of June 29, 1906, 34 Stat. 590, c. 3591, as amended by Act of June 18, 1910, 36 Stat. 553, c. 309, and by Act of Feb. 28, 1920, 41 Stat. 488, c. 91; 49 U.S.C. Section 15 (13).

APPELLANT'S REPLY BRIEF

FILE COPY

In the Supreme Court

OF THE

United States

Supreme Court, U. S.
FILED
MAR 16 1946
CHARLES ELMORE CROPLEY

OCTOBER TERM, 1945

No. 428

EL DORADO OIL COMPANY AND EL DORADO TERMINAL COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GENERAL AMERICAN TRANSPORTATION COMPANY, et al.,

Appellees.

Appeal from the District Court of the United States for the Northern District of California.

APPELLANTS' REPLY BRIEF.

W. F. WILLIAMSON,
310 Sansome Street, San Francisco 4, California,
Counsel for Appellants.

WILLIAM B. MEAD,
WILLIAMSON & WALLACE,
310 Sansome Street, San Francisco 4, California,
Of Counsel.

Subject Index

	Page
Opinions Below	2
Jurisdiction	2
Statutes Involved	3
Statement of the Case	3
Argument	10
A. The Commission failed and refused to make the investigation and to determine what is a reasonable allowance to be paid by carriers for the furnishing of tank cars for the carriers' use	10
B. In sanctioning the payment by the carriers to the car company that did not furnish the tank cars of a mileage allowance in excess of the car rentals paid by the oil works, the Commission exceeded its authority and violated the duty imposed upon it by Section 15(13) of the Commerce Act	13
C. The decision of the Commission that an allowance to the oil works by the carriers or the car company under the car lease agreement, in excess of the car rentals payable under the agreement would be unjust and unreasonable and would unduly prefer the oil works as a shipper, was entirely without support in the evidence and was arbitrary and contrary to law	15
D. The Commission's decision (R. 250) that the amount paid by the car company to the oil works prior to July 1, 1934, under the terms of the agreement, to the extent it was in excess of the car rental due thereunder, was unjust and unreasonable and unduly preferred the oil works as a shipper of its commodities, was not supported by any evidence but was contrary to all of the evidence in the record	17
E. The decision on the purported authority of the Commission's order in the refrigerator car case, that if in accordance with the car leasing agreement the oil works was paid the car mileage collected by the car company from the carriers, the oil works would thereby	

Page

obtain the transportation of commodities shipped by it at a lower cost than others who used cars assigned to them by the carriers or who owned their own cars, was wholly unsupported by the evidence, and, there was no evidence whatever as to the relative cost of furnishing tank cars by carriers or car owners as distinguished from car renters, and no evidence that any car owners furnished tank cars to the carriers for transportation purposes or that the carriers furnished such cars to shippers for the transportation of their commodities 22

F. The finding (R. 250) that the amount paid by the car company to the oil works prior to July 1, 1934 under the terms of the agreement, to the extent that it was in excess of the rentals due thereunder, was unjust and unreasonable and unduly preferred the oil works as a shipper of its commodities, is not only wholly without supporting evidence in the record, for reasons heretofore stated, but such finding was beyond the statutory authority or jurisdiction of the Commission 23

G. The Commission's findings and order that the maximum compensation to be paid by the carriers should not exceed the car rental paid by the shippers stems from an erroneous view of the law and in effect imposes upon the carriers the responsibility of determining the car rental paid by a shipper for each car furnished to the carriers. This precludes a uniform allowance and the disclosure thereof in the published tariffs as required by Section 15(13) of the Commerce Act 32

Conclusion 33

Table of Authorities Cited

Cases	Pages
Elgin, J. & E. Ry. Co. v. United States, 253 Fed. 907	19
Erie R. Co., et al. v. United States (Unreported)	16
General American Tank Car Corp. v. El Dorado Terminal Co., 308 U. S. 422	4, 10, 12, 13, 15, 25
Great Northern Ry. Co. v. Merchants Elevator Co., 259 U. S. 285	23, 24, 25
In re Private Cars, 50 I.C.C. Report 652	16
Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42	15
Interstate Commerce Commission v. Louisville & Nashville R. Co., 227 U. S. 88	18
Interstate Commerce Commission v. Reichmann, 145 Fed. 235	15, 20
Northern Central Ry. Co. v. United States, 241 Fed. 25	19
Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292	18
Ohio Tank Car Co. v. Keith Ry. Equipment Co., 148 Fed. (2d) 4	19
Perkins v. Elg, 307 U. S. 325	24
Shannahan v. United States, 303 U. S. 596	31
Shields v. Utah Idaho Cent. R. Co., 305 U. S. 177	31
Spencer-Kellogg & Sons v. United States, 20 Fed. (2d) 459	20
United States v. Durkee Famous Foods, Inc., 17 Fed. Supp. 846	19
Use of Privately Owned Refrigerator Cars, 201 I.C.C. 323	16

Statutes	
Elkins Act (49 U.S.C. 41 (1)(2))	3
Interstate Commerce Act, Section 2	32
Interstate Commerce Act, Section 15(13) (49 U.S.C. 15(13))	3, 11, 13, 14, 32
Urgent Deficiencies Act (38 Stat. 219; 28 U.S.C. Secs. 41(28) and 43-46, inc.)	2

Page

obtain the transportation of commodities shipped by it at a lower cost than others who used cars assigned to them by the carriers or who owned their own cars, was wholly unsupported by the evidence, and there was no evidence whatever as to the relative cost of furnishing tank cars by carriers or car owners as distinguished from car renters, and no evidence that any car owners furnished tank cars to the carriers for transportation purposes or that the carriers furnished such cars to shippers for the transportation of their commodities 22

F. The finding (R. 250) that the amount paid by the car company to the oil works prior to July 1, 1934 under the terms of the agreement, to the extent that it was in excess of the rentals due thereunder, was unjust and unreasonable and unduly preferred the oil works as a shipper of its commodities, is not only wholly without supporting evidence in the record, for reasons heretofore stated, but such finding was beyond the statutory authority or jurisdiction of the Commission 23

G. The Commission's findings and order that the maximum compensation to be paid by the carriers should not exceed the car rental paid by the shippers stems from an erroneous view of the law and in effect imposes upon the carriers the responsibility of determining the car rental paid by a shipper for each car furnished to the carriers. This precludes a uniform allowance and the disclosure thereof in the published tariffs as required by Section 15(13) of the Commerce Act 32

Conclusion 33

Table of Authorities Cited

Cases

	Pages
Elgin, J. & E. Ry. Co. v. United States, 253 Fed. 907	19
Erie R. Co., et al. v. United States (Unreported)	16
General American Tank Car Corp. v. El Dorado Terminal Co., 308 U. S. 422	4, 10, 12, 13, 15, 25
Great Northern Ry. Co. v. Merchants Elevator Co., 259 U. S. 285	23, 24, 25
In re Private Cars, 50 I.C.C. Report 652	15
Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42	15
Interstate Commerce Commission v. Louisville & Nashville R. Co., 227 U. S. 88	18
Interstate Commerce Commission v. Reichmann, 145 Fed. 235	15, 20
Northern Central Ry. Co. v. United States, 241 Fed. 25	19
Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292	18
Ohio Tank Car Co. v. Keith Ry. Equipment Co., 148 Fed. (2d) 4	19
Perkins v. Elg, 307 U. S. 325	24
Shannahan v. United States, 303 U. S. 596	31
Shields v. Utah Idaho Cent. R. Co., 305 U. S. 177	31
Spencer-Kellogg & Sons v. United States, 20 Fed. (2d) 459	20
United States v. Durkee Famous Foods, Inc., 17 Fed. Supp. 846	19
Use of Privately Owned Refrigerator Cars, 201 I.C.C. 323	16

Statutes

Elkins Act (49 U.S.C. 41 (1)(2))	3
Interstate Commerce Act, Section 2	32
Interstate Commerce Act, Section 15(13) (49 U.S.C. 15(13))	3, 11, 13, 14, 32
Urgent Deficiencies Act (38 Stat. 219; 28 U.S.C. Secs. 41(28) and 43-46, inc.)	2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1945

No. 428

EL DORADO OIL COMPANY AND EL DORADO TERMINAL COMPANY,
Appellants,
vs.
THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GENERAL AMERICAN TRANSPORTATION COMPANY, et al.,
Appellees.

Appeal from the District Court of the United States for the Northern District of California.

APPELLANTS' REPLY BRIEF.

INTRODUCTORY.

This brief is presented in behalf of appellants, El Dorado Oil Works and El Dorado Terminal Company, upon the merits pursuant to the directions of this Court following the argument as to Jurisdiction on January 29, 1946.

OPINIONS BELOW.

The opinion of the specially constituted District Court (R. 33) is reported in 59 F. Supp. 738.

The report of the Interstate Commerce Commission is reported in 258 I.C.C. 371.

JURISDICTION.

1. The final decree of the Three Judge District Court organized pursuant to the Urgent Deficiencies Act (38 Stat. 219; 28 U.S.C. Secs. 41 (28) and 43-46, inclusive) was entered on April 9, 1945.

2. The petition for appeal was presented to and allowed by the said District Court on June 1, 1945. The record on appeal was filed within the time allowed by law. (R. 42, 43.)

3. The jurisdiction of this Court is invoked under Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, par. (4); U.S.C., Title 28, Sec. 345) and Section 210 of the Judicial Code. (38 Stat. 220, 28 U.S.C. 47a.)

4. This Court on October 15, 1945, entered its order noting probable jurisdiction and transferring the case to the summary docket. (R. 267.)

5. Following the hearing of this cause on January 29, 1946, this Court ordered the cause set down for argument on the merits for March 25, 1946.

STATUTES INVOLVED.

Section 15(13) of the Interstate Commerce Act (49 U.S.C. 15(13));

Elkins Act (49 U.S.C. 41(1)(2)).

STATEMENT OF THE CASE.

This action was instituted by Appellants (Plaintiffs below) under the Urgent Deficiencies Act to annul and set aside an order of the Interstate Commerce Commission dated April 10, 1944, in a proceeding entitled "Allowances for Privately Owned Tank Cars". (258 I.C.C. 371.) The complaint charged that the Commission was without constitutional authority to proceed as it did; that it exceeded its statutory authority and did not comply with the plain provisions of Section 15(13) of the Interstate Commerce Act (Appendix A); that its findings and decisions were not supported by the prerequisites of proof and that there was no evidence whatever to support its decision. (R. 1-5.) The United States, the Interstate Commerce Commission, General American Transportation Corporation and some eighty-eight (88) railroads filed answers. (R. 6, 11, 22, 29.) Thereafter, the Three Judge District Court rendered an opinion declaring that the Court would not pass upon the merits of the case because it lacked jurisdiction of the subject matter. The opinion further stated that the Interstate Commerce Commission in its action had followed the directions of the Supreme Court in its

decision in the case of *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422. (R. 35.) Following this opinion, findings and conclusions were filed and a final decree was entered on April 9, 1945, denying to the Appellants the relief prayed for and dismissing the action for want of jurisdiction. (R. 40-41.) The present appeal is from that judgment. The jurisdiction of this Court to hear the appeal was challenged by Appellees' motion to affirm without argument, which has heretofore been argued and determined. The case is at present before this Court on the merits.

Inasmuch as the arguments advanced by Appellees and Intervenors in their briefs heretofore filed have covered the earlier action in assumpsit filed in the District Court for the Northern District of California, Southern Division, and the progress of that case through the courts until it culminated in the decision of this Court reported in 308 U.S. 422, a statement of the case and its history is in order.

The Appellant, El Dorado Oil Works, was prior to the year 1933 and since engaged in the extraction of cocoanut oil from copra in plants at Berkeley and Oakland, California. On September 28, 1933, it entered into an agreement with General American Tank Car Corporation, predecessor of General American Transportation Company, intervenor in this action, under which the Tank Car Corporation, which for convenience will be referred to as the "Car Company," leased to the Oil Works 50 tank cars of the size and type required by the Oil Works, at a monthly

rental of $27.50 per car. (R. 52-54.) The Oil Works also agreed to take, and the Car Company further agreed to supply the Oil Works with, such additional tank cars as it might require at a monthly rental of $30.00 per car. (R. 54-56.) Under the agreement the Oil Works was permitted to use the cars for the transportation of its cocoanut oil within the United States. It routed the cars according to the requirements of its business over the lines of transcontinental and other interstate carriers. The agreement required the Car Company to collect the mileage earned, under the applicable railroad tariffs, by such use of the leased cars and to credit to the Oil Works monthly the mileage so earned. (R. 52, 55, 56.) Similar lease contracts had been in effect between the Oil Works and the Car Company over a period of years and in practice the Car Company paid monthly to the Oil Works the monies so received from the carriers as mileage earned by the movement of the cars after deducting current car rentals due or accrued. This practice was continued until July, 1934. Thereby the Car Company had accounted for and paid to the Oil Works the mileage allowance earned by the use of the leased tank cars for the first five months of the leasehold period beginning January, 1934, and including December, 1936. In July, 1934, and thereafter, the Car Company refused to pay to the Oil Works any part of the mileage allowance so collected by it for the use of the tank cars so furnished by the Oil Works in excess of the monthly rental reserved in the lease agreement, although the Car Company continued to receive and retain the full mileage allowance of one

and one-half cents per car mile provided to be pai in the published tariffs of the carriers.

In June, 1935, the El Dorado Terminal Company a wholly owned subsidiary of the El Dorado Oi Works, brought suit as assignee against the Car Com pany in the United States District Court for th Northern District of California, Southern Division to recover the amount of mileage so collected by th Car Company and retained by it for the furnishin by the Oil Works of the leased tank cars up to Ma 31, 1935. (R. 43-49.) In its answer to said complain the Car Company admitted and pleaded the car leas agreement of September 28, 1933. It also admitte its receipt and retention of the sum of $18,532.78 fro the carriers as mileage for the use of said leased ca but denied liability on the sole ground that the pay ment of said sum to the Oil Works as provided in th car lease agreement was expressly prohibited by th provisions of the Elkins Act and that such paymen by the Car Company would be unlawful in that th Oil Works would by such payment obtain a rebate o concession in violation of the provisions of the Elkin Act. Following a trial, the United States Distric Court rendered judgment for the Car Company with out opinion or findings. The Circuit Court of Appeal for the Ninth Circuit reversed the District Court an ordered judgment for the Oil Works for the fu amount so claimed. Certiorari was granted by th Court on the petition of the Car Company and th Interstate Commerce Commission. (R. 49-50.) In a opinion delivered January 2, 1940, this Court gene

ally followed and approved the reasoning of the Circuit Court of Appeals but held that where questions within the administrative jurisdiction of the Interstate Commerce Commission were presented, the District Court should have stayed its hand until such questions could be passed upon by the Commission. (308 U.S. 422.) The construction to be placed upon that decision was the subject of controversial discussion in the Lower Court and again in the briefs filed in this case. No action was taken following the decision, either by the Interstate Commerce Commission or the Car Company. The Oil Works, however, petitioned the Commission for an investigation and to make such order or orders as the Commission might consider proper in the premises. (R. 50-51.) The Commission appointed an examiner who took testimony and the matter was argued before the Commission on November 5, 1941. The report of the Commission, consisting of findings and an order of dismissal, was filed on April 10, 1944. (R. 237.) In due time and after petition for rehearing and reconsideration had been filed by the Oil Works and denied, the present action was instituted in the District Court for the Northern District of California, Southern Division, and a Three Judge Court was constituted consisting of a Circuit Judge and two District Judges. From the final decree of the Three Judge District Court dismissing the action, the present appeal was taken. In its statement of points on which Appellants intend to rely on this appeal (filed September 26, 1945), Appellants assigned the following:

(a) That the Commission, contrary to the provisions of Section 15(13) of the Commerce Act, failed and refused to make a proper investigation or establish a uniform and reasonable allowance to be paid in the future by carriers to the furnishers of tank cars;

(b) Contrary to the provisions of Section 15(13) of the Commerce Act, the findings and order of the Commission sanctioned the payment of a higher mileage allowance by the carriers to an owner of tank cars who had not furnished the cars than that determined by the Commission in the same order to be the maximum allowance to be paid to the furnishers of such cars;

(c) The finding of the Commission, which was incorporated by reference in the Commission's order, that an allowance to the Oil Works by the carriers or the Car Company under the car lease agreement in excess of the car rentals would be unjust and unreasonable and would unduly prefer the Oil Works as a shipper, was entirely without support in the evidence and was arbitrary and contrary to law;

(d) The findings of the Commission that the amount paid by the Car Company to the Oil Works prior to July 1, 1934, under the terms of the car leasing agreement, to the extent that it exceeded the car rentals, was unjust and unreasonable and unduly preferred the Oil Works as a shipper, was not supported by any evidence and was contrary to all of the evidence in the record and, therefore, was arbitrary;

(e) The finding that if, in accordance with the car leasing agreement the Oil Works was paid the car

mileage collected by the Car Company from the carriers, the Oil Works would thereby obtain the transportation of the commodity shipped by it in interstate commerce at a lower cost than others who used cars assigned to them by the carriers, or who owned their own cars, was unsupported by the evidence and there was no evidence whatever as to the relative costs of furnishing tank cars by carriers or car owners, as distinguished from car renters, and no evidence that any car owners furnished tank cars to the carriers for transportation purposes or that the carriers furnished such cars to the shippers for the transportation of their commodities;

(f) The finding that a reasonable allowance "has been made to the Oil Works through credits made * * * by the Tank Car Corporation" was contrary to the evidence and in excess of the authority of the Commission and, in effect, a decision of the issues before the District Court in the original assumpsit action. In so holding the Commission erroneously usurped the function of the District Court before which the action in assumpsit is pending;

(g) The Commission's findings and order that the maximum compensation to be paid by the carriers should not exceed the car rentals paid by the shippers stems from an erroneous view of the law and, in effect, imposes upon the carriers the responsibility of determining the car rental paid by a shipper for each car furnished by him to the carriers. This precludes a uniform allowance and the disclosure thereof in the published tariffs, as required by Section 15(13) of the Commerce Act.

ARGUMENT.

A. THE COMMISSION FAILED AND REFUSED TO MAKE THE INVESTIGATION AND TO DETERMINE WHAT IS A REASONABLE ALLOWANCE TO BE PAID BY CARRIERS FOR THE FURNISHING OF TANK CARS FOR THE CARRIERS' USE.

As declared by this Court in its decision of *General American Tank Car Corp. v. El Dorado Terminal Co.*, supra, a shipper furnishing tank cars or other facilities used by the carriers is entitled to receive from the carriers compensation that is just and reasonable, which compensation must be determined by the Commission after investigation as provided in Section 15(13) of the Interstate Commerce Act. There is no other statutory authority for such action. If the owner of property transported shall furnish the facility used or render the service, he is entitled under the plain provisions of this section to receive the compensation when and as so determined. This is clear not only under the language of the section, but also under the language of this Court in its decision of the *General American Tank Car Corp.* case, supra. Action on the part of the Commission may be brought about on a complaint to the Commission or on its own initiative. In the present controversy, the Appellants petitioned the Commission for action under this section. The Commission granted the said petition but also ordered upon its own motion the investigation which resulted in the decision and order under attack in the present suit. (R. 58.) The Appellants in petitioning for the investigation were not complainants. They did not charge discrimination or undue preferences of any kind nor did they charge rebates or

claim against carriers for reparation or for the payment by the carriers of the mileage allowance. They merely filed a petition to initiate the investigation and determination contemplated by the statute and indicated by the decision of this Court as necessary or proper in the circumstances of the case. Under the language of the statute the investigation was to be the same whether it was initiated by a complaining shipper or by the Commission on its own initiative. It is an admitted fact, and so held by this Court in its opinion and recognized by the Commission in its decision, that during the period covered by the present controversy the mileage allowance of one and one-half cents per car mile, loaded and empty, had been provided for in the approved and published tariffs of the railroad carriers. This Court also held that the carriers' tariffs during the same period contained a provision that the mileage allowance would be paid to the registered car owner and not to a shipper lessee. While the tariff containing this restriction was in effect, the carriers could not have lawfully paid the mileage allowance to Appellants as shippers, but, as to that matter, this Court held that, having furnished the tank cars, Appellants, as shippers, were entitled to the mileage allowance under the plain provisions of Section 15(13), and that the restrictions referred to must give way before the definite language of the statute. In the investigation referred to, the Commission could not, even if application had been made therefor, require the carriers to pay the mileage allowance to Appellants in contravention of the approved and published tariffs nor could the Commis-

sion have obviated the provisions of the tariffs that had been in effect for many years. All that the Commission could do under the cited section either on complaint or on its own initiative was to determine a reasonable charge as a maximum to be paid by the carriers for the instrumentality furnished and fix the same by an appropriate order. The order so made and the tariffs so approved could only be effective in the future. The language of the statute would clearly indicate this as did this Court at pages 431 and 432 of its decision in the *General American Tank Car Corp.* case, supra. It therefore devolved upon the Commission to make a full investigation of the furnishing of tank cars either by owners or shippers as a class and to determine a rate for such service that would be just and reasonable in the light of all of the facts so ascertained. It as disclosed in the case before the Court, the effective mileage allowance would in some cases yield a profit to the shipper, that was a matter to be considered by the Commission in determining a just and reasonable allowance. As to the past, the allowance was definite and effective under the published tariffs; but as to the future, it was open to determination by the Commission in the light of all facts discovered upon investigation, including the fact that some shippers might profit while others might not. The Commission did not make such an investigation. It investigated the course of dealing over the years between the Car Company and the Oil Works. In so doing, the Commission failed to perform the duty devolving upon it under Section 15(13) of the Act as construed by this Court in its decision in the

General American Tank Car Corp. case, supra. In applying the provisions of Section 15(13) of the Act to the present case, this Court said at page 430:

> "The Commission is compelled to ascertain in the light of past and present experience a fair and reasonable compensation to cover such costs and prescribe a uniform rate which will reflect such experience."

The Commission deliberately failed to do this and justified its failure with the statement:

> "Were we to attempt to determine the reasonableness of allowance for a 'class' of tank cars such as these, we cannot tell how far reaching the investigation would have to be." (R. 249.)

We submit the action of the Commission was arbitrary and reflects an erroneous view of the law.

B. IN SANCTIONING THE PAYMENT BY THE CARRIERS TO THE CAR COMPANY THAT DID NOT FURNISH THE TANK CARS OF A MILEAGE ALLOWANCE IN EXCESS OF THE CAR RENTALS PAID BY THE OIL WORKS, THE COMMISSION EXCEEDED ITS AUTHORITY AND VIOLATED THE DUTY IMPOSED UPON IT BY SECTION 15(13) OF THE COMMERCE ACT.

In its decision and under the admitted facts, the Commission held that the Oil Works, as shipper-lessee, had furnished the tank cars as instrumentalities for the use of the carriers. The Commission expressly held that the mileage allowance exceeded the car rentals payable by the Oil Works under the car lease agreement. (R. 242.) The Commission also de-

cided that the just and reasonable allowance as a maximum to have been paid by the rail carriers to the Oil Works for the furnishing of such cars would have been an amount not to exceed the car rental. (R. 242.) In holding that the Oil Works is not entitled to claim from the Car Company the overage above the car rentals, the Commission in effect, if not in terms, sanctioned the payment by the carriers to the Car Company (though it did not furnish the cars) of an amount as compensation for the cars furnished by the Oil Works in excess of the allowance which in the same order the Commission had determined was the maximum that could be paid by the carriers for the service. This finding was in excess of the Commission's authority under Section 15(13) of the Act: First, because it sanctioned a payment to one who had not furnished the service; and Second, because it sanctioned the payment of an amount in excess of that which the Commission had determined in the same order could be made as a maximum to one who did furnish the service. This action of the Commission clearly proceeded from an erroneous view of the law. Under the provisions of Section 15(13) of the Act a compensatory allowance for the furnishing of a service or instrumentality was only permitted to be paid to the person so furnishing the service. If the car rental was the maximum permissible payment the or any payment to the car company in excess of the car rental was unlawful.

C. THE DECISION OF THE COMMISSION THAT AN ALLOWANCE TO THE OIL WORKS BY THE CARRIERS OR THE CAR COMPANY UNDER THE CAR LEASE AGREEMENT IN EXCESS OF THE CAR RENTALS PAYABLE UNDER THE AGREEMENT WOULD BE UNJUST AND UNREASONABLE AND WOULD UNDULY PREFER THE OIL WORKS AS A SHIPPER, WAS ENTIRELY WITHOUT SUPPORT IN THE EVIDENCE AND WAS ARBITRARY AND CONTRARY TO LAW.

If the finding is to be understood as applicable to the future only, it is purely speculative. Conditions under which the payment would be unjust or unreasonable or unduly preferential could not arise until the stipulated payments had been made. Whether the payments agreed upon would produce any of the results prohibited by the law must of necessity depend upon what should transpire after the payments were made. The finding was therefore a mere assumption and arbitrary. In reaching its decision, the Commission evidently relied upon two circumstances. One was that the Appellants had realized a profit above the car rentals for the period during which the Car Company had paid over the mileage collected by it as Appellants' agent under the terms of the car lease agreement. The profit so realized was not a rebate nor do the Appellees make that claim. This Court in its opinion in *General American Tank Car Corp. v. El Dorado Terminal Co.* and also in *Interstate Commerce Commission v. Diffenbaugh*, 222 U.S. 42, and the Commission itself in its order in *In re Private Cars* (50 Interstate Commerce Commission Report 652), recognized that the realization of such profit was not unlawful. No prohibited rebate or preference can be properly inferred from the profit alone because the

payment of the car rental would result in a continuous loss to the car renter if by reason of strikes or world war conditions he was unable to make oil shipments in the leased cars. The Commission also apparently relied upon its report in the *Refrigerator Car* case (201 I.C.C. 323), and counsel for Appellees have endeavored to defend the Commission's action on the authority of that report. That report was not substantial or any evidence as to the facts in the investigation under review in this action. In its decision in the *Refrigerator Car* case, the Commission pointed out the difference in the matter of supply and demand between the use of refrigerator cars and tank cars, and held that the evidence in that proceeding was insufficient to justify findings as to whether the abuses found to exist as to refrigerator cars attended the use of tank cars. (R. 247-8.) For that reason the order was expressly limited to refrigerator cars. There was no additional evidence before the Commission on the investigation under attack and therefore neither the report in the *Refrigerator Car* case nor the evidence before the Commission upon which that report was based was evidence on this investigation that payments by the Car Company in accordance with the car lease agreement in excess of the car rentals would be unjust or unreasonable or unduly prefer the Oil Works as a shipper. In *Erie R. Co., et al. v. United States*, decided March 24, 1944, the Three Judge Court sitting in the District Court of the United States for the Southern District of Ohio, Eastern Division, set aside an order of the Commission which was based upon a former decision of the Commission without other

facts or evidence. The present is a replica of that case and justifies Appellants' position that the order of April 10, 1944, should be set aside and annulled.

D. THE COMMISSION'S DECISION (R. 250) THAT THE AMOUNT PAID BY THE CAR COMPANY TO THE OIL WORKS PRIOR TO JULY 1, 1934, UNDER THE TERMS OF THE AGREEMENT, TO THE EXTENT IT WAS IN EXCESS OF THE CAR RENTAL DUE THEREUNDER, WAS UNJUST AND UNREASONABLE AND UNDULY PREFERRED THE OIL WORKS AS A SHIPPER OF ITS COMMODITIES, WAS NOT SUPPORTED BY ANY EVIDENCE BUT WAS CONTRARY TO ALL OF THE EVIDENCE IN THE RECORD.

Viewing this decision as referring to payments in the past as distinguished from those to be paid in the future under the contract, the evidence shows that the Oil Works sold its oil at a price f.o.b. its plant on San Francisco Bay. It was never called upon to pay nor did it pay the freight on its shipments of the tank cars. The cars were shipped on order ladings with draft attached for the agreed purchase price. Ladings and drafts were forwarded to a bank for collection. The consignee upon taking up the drafts secured possession of the commodity shipped upon paying the freight charges. In every instance, the consignee had paid the full tariff rate. He had no relation with the carrier except such payment. There was no relation between the Oil Works as shipper and the carrier except delivery of the loaded cars for transportation. The only payment by the carriers was the amount of mileage stated in the tariffs. This payment was made to the Car Company and not the shipper because of

restrictive provisions in those tariffs. There was no evidence of an understanding or agreement between the carrier and the Car Company as to the disposition by the Car Company of the mileage received by it, and there was no evidence that the receipt by the Oil Works of the earned mileage from the Car Company in accordance with the car lease agreement constituted a preference of the Oil Works as a shipper over other shippers or other renters or users of cars. The effect of such payment was to merely reduce the rentals paid for the use of the cars under the car lease agreement. Except that the Oil Works showed that it paid a substantial amount for the cleaning and preparation of each tank car before putting it in use, this was all the evidence before the Commission as to the operation of the car lease agreement between the Oil Works and the Car Company. That evidence does not show that in such past dealings the Oil Works by the receipt of the agreed mileage payments from the Car Company received a rebate or a preference as a shipper or that such payments were unjust or unreasonable. The finding is arbitrary and without support in the evidence. This Court has consistently adhered to the rule that a finding unsupported by evidence or contrary to the evidence is arbitrary and should be annulled. (*Interstate Commerce Commission v. Louisville & Nashville R. Co.*, 227 U.S. 88; *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292.)

The Elkins Act prohibits the transportation by common carrier of property at a less rate than that published and applicable under the tariff. It also

prohibits a resort to any device whereby a shipper knowingly solicits, accepts or receives a concession or discrimination in respect to transportation. (Sec. 41, Title 49, U.S.C.A.) Following this section the courts have held that there could be no violation of the provisions of the Elkins Act where there was strict adherence to the published tariffs. (*U. S. v. Durkee Famous Foods, Inc.*, 17 Fed. Supp. 846.)

Counsel for the Appellee, General American Transportation Company, take issue with the foregoing claims of Appellants and at pages 20 and 21 cite authority which they assert sustains their view. In the cited case, *Northern Central Ry. Co. v. United States*, the defendant, an interstate railroad carrier, leased mining property owned by it to a mining company on a royalty basis. The coal produced was shipped over the line of the defendant carrier, and in consideration thereof the carrier remitted the royalty. This was held a rebate or concession.

In *Elgin J. & E. Railway Co. v. U. S.*, also cited by Appellee, the railroad company, by false billing, assisted a shipper to obtain transportation at less than the usual rates. An indictment alleging the facts as above was held sufficient, although it failed to allege that the shipper actually paid the freight, because the false billing, with its subsequent assistance to the shipper, constituted the offense.

Ohio Tank Car Co. v. Keith Railway Equipment Co. is equally without point. That case involved an arrangement whereby a shipper received the benefit of a concession in freight charges through payments

made to its wholly-owned subsidiary where the officers, directors and stock owners of both companies were the same. It was apparently a device whereby the rebate or concession was granted and received indirectly. There was no such condition in the instant case. There was no evidence, nor has it been claimed at any time in this Court, before the Commission or in the lower Court, that the car-leasing agreement was used as a cloak to conceal any rebate or concession.

Appellee's counsel have evidently overlooked the admitted facts above mentioned in further citing *Interstate Commerce Commission v. Reichmann* and *Spencer-Kellogg & Sons v. U. S.* The issue before the Court in the *Reichmann* case was the power of the Commission, on examining a witness who was president of a private car company, as to his agreement with a car user in respect of beneficial allowances inducing the shipper's action in transportation. Under the language of the Elkins Act, the questions were proper and should have been answered, and that was the only question before the Court. Judge Landis, however, took advantage of the opportunity afforded by the case to make an extended analysis of the Elkins Act, which had been recently passed. We may concede what the Court so decided in 1906, but it does not touch the present case at any point.

In the *Spencer-Kellogg* case the elevator company was convicted of giving a rebate or concession in respect to transportation in interstate commerce. It was the operator of a grain elevator at Buffalo. Shipments of grain from the Middle West through the

Lakes passed through Buffalo eastbound on a through rate which included a charge by the elevator company for elevating, storing for a limited time and reloading the grain for transportation to seaboard. The allowance for this service was included in the through tariffs, and the elevator company, to induce the shipment of grain through its elevator, refunded a portion of the compensation which it had received for transportation. Appellees apparently believe that this case supports their claim that a rebate or concession prohibited under the Elkins Act may be accomplished without the intervention of a carrier. The perfect answer to that contention is found in the closing paragraph of the opinion of the Circuit Court of Appeals in the cited case, where the Court, in sustaining the conviction, said:

> "The penalty is imposed here not because it was acting for the carrier but because it performed a service of transportation and gave a rebate to its shipper or consignee from the compensation received for that part which it performed."

E. THE DECISION ON THE PURPORTED AUTHORITY OF THE COMMISSION'S ORDER IN THE REFRIGERATOR CAR CASE THAT IF IN ACCORDANCE WITH THE CAR LEASING AGREEMENT THE OIL WORKS WAS PAID THE CAR MILEAGE COLLECTED BY THE CAR COMPANY FROM THE CARRIERS, THE OIL WORKS WOULD THEREBY OBTAIN THE TRANSPORTATION OF COMMODITIES SHIPPED BY IT AT A LOWER COST THAN OTHERS WHO USED CARS ASSIGNED TO THEM BY THE CARRIERS OR WHO OWNED THEIR OWN CARS, WAS WHOLLY UNSUPPORTED BY THE EVIDENCE, AND THERE WAS NO EVIDENCE WHATEVER AS TO THE RELATIVE COST OF FURNISHING TANK CARS BY CARRIERS OR CAR OWNERS AS DISTINGUISHED FROM CAR RENTERS, AND NO EVIDENCE THAT ANY CAR OWNERS FURNISHED TANK CARS TO THE CARRIERS FOR TRANSPORTATION PURPOSES OR THAT THE CARRIERS FURNISHED SUCH CARS TO SHIPPERS FOR THE TRANSPORTATION OF THEIR COMMODITIES.

The first proposition—that is to say, that the Oil Works would, in the event of such payment, obtain transportation of its commodity at a favorable rate, is sufficiently answered by our observations in the two preceding paragraphs. Our contention as to the absence of any evidence on the relative cost of furnishing cars by carriers or car owners, as distinguished from car renters, finds support in the printed record of the evidence taken during the investigation. This evidence is found at pages 61-236, both inclusive. It is significant that although this point was advanced in the earlier brief filed by Appellants in this Court, counsel for the Appellees have cited no evidence to sustain the decision. On the other hand, the Commission's statements at page 248 of the record, explaining its failure to investigate beyond the dealings between the Oil Works and the Car Company, supports our challenge to this finding. The rule that the deci-

sion and order of the Commission will be annulled in the absence of any evidence to support it is so well established and universally recognized that we do not feel called upon to again cite authority to sustain our contention.

F. THE FINDING (R. 250) THAT THE AMOUNT PAID BY THE CAR COMPANY TO THE OIL WORKS PRIOR TO JULY 1, 1934 UNDER THE TERMS OF THE AGREEMENT, TO THE EXTENT THAT IT WAS IN EXCESS OF THE RENTALS DUE THEREUNDER, WAS UNJUST AND UNREASONABLE AND UNDULY PREFERRED THE OIL WORKS AS A SHIPPER OF ITS COMMODITIES, IS NOT ONLY WHOLLY WITHOUT SUPPORTING EVIDENCE IN THE RECORD, FOR REASONS HERETOFORE STATED, BUT SUCH FINDING WAS BEYOND THE STATUTORY AUTHORITY OR JURISDICTION OF THE COMMISSION.

The distinction between the authority of the Commission on the one hand and that of the Courts on the other was clearly stated by this Court in its decision in the case of *Great Northern Railway v. Merchants Elevator Co.*, 259 U.S. 285. This Court there pointed out the difference between questions of law as to the force of a statute or the construction of the tariff and questions as to technical matters involved in the framing of tariffs or rules. Questions of the first type were held to be subject to determination by the Courts. Specifically, the Court said:

> "To determine what rate; rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by exaction of an unreasonable or discriminatory rate is a judicial function."

The finding in question dealt only with the matter of previous payments of the Car Company under the car lease agreement, and the Commission held that such payments were unjust and unreasonable and, in effect, therefore unlawful to the extent that they exceeded the car rentals due under the contract.

Under the rule announced in *Great Northern Railway v. Merchants Elevator Co.*, supra, this was a question peculiarly within the jurisdiction of the courts and not within the authority of the Commission.

It would seem very clear that the Commission, in the finding referred to, took an erroneous view of the law and usurped the province of the Courts, whether it intended to hold that the payments referred to were made in violation of the applicable tariffs or any provision of the Interstate Commerce Act. In the recent case of *Perkins v. Elg*, 307 U.S. 325, this Court, following previous decisions, held that an administrative order based upon an erroneous rule of law should be set aside on that ground.

With probable reference to this contention of Appellants, counsel for the United States and the Interstate Commerce Commission, in their brief heretofore filed, assert (p. 31) that the assumpsit action involved only claims relating to the past and that this Court would not have stayed the hand of the District Court unless the Court had decided Section 15(13) of the Commerce Act gave the Commission power over past allowances. The statement that the assumpsit action involved only claims relating to the past was not en-

tirely correct. The payments referred to in the finding under examination had already been made under the terms of the contract, and the Appellants were merely seeking recovery of monies received by the Car Company as mileage earned by Appellants' tank cars and retained by the Car Company in breach of its agreement. Our construction of the provisions of Section 15(13) of the Act precludes a conclusion that the Commission had any authority under that section to determine the validity of past transactions but was authorized only, after investigation, to determine a just and reasonable allowance to be applicable for the future and to be published anew in the appropriate tariffs. We cannot agree that this Court intended to repudiate or overrule its decision in *Great Northern Railway v. Merchants Elevator Company*, supra, without even referring to the case. Nor can we assume that the Commission intended to condemn the practice of renting cars by a shipper or the payment of a mileage allowance that had been in effect and in the published tariffs for a great many years, especially in view of the statement by this Court in its opinion in *General American Tank Car Corp. v. El Dorado Terminal Co.*, supra, that such practice and such allowances were lawful and had been so recognized by the Commission.

In their briefs heretofore filed in this Court and in argument upon the question of jurisdiction, counsel for Appellees have attempted to justify the action of the Commission on the plea that authority for such action was given to the Commission by this Court in deciding *General American Tank Car Corp. v. El Dorado Terminal Co.*, supra.

In their answer to the complaint in the Lower Court, Appellees alleged that the Commission's report "does nothing more than to make certain administrative findings upon certain questions involved in a suit of law now pending before this Court, regularly constituted as a District Court of one judge, in which plaintiffs seek to recover certain sums of money". (R. 11 and 14.) The necessary theory of the pleading and the argument of counsel for the Appellees is that this Court in its former decision authorized the Commission to decide some at least of the issues in the assumpsit action. No such authority is vested in the Commission by the Constitution and Section 15(13) of the Interstate Commerce Act defining the authority of the Commission in matters of this character gives no such or any authority to the Commission in respect to issues in a civil action. We do not believe that this Court in the decision referred to intended to either broaden or narrow the authority of the Commission as expressed in the section of the act or to give to the Commission any authority over civil actions.

In its former decision (308 U.S. 422) this Court, after stating all of the pertinent facts, held that the Oil Works, and not the Car Company, had furnished the tank cars to the carriers for transportation purposes; that the one and one-half cent per mile allowance for said service appeared in the carriers' published tariffs and would remain the legal rate payable for the use of such cars until action by the Commission, and that the car lease agreement constituted the Car Company a mere agent for the collection and payment of the mileage allowance. (308 U.S. 427.)

Continuing, this Court said that the renting of cars by shippers and the furnishing of them to carriers was entirely lawful and had been so held by the Commission (Id. 429); that the requirements of paragraph 13 of Section 15 of the Commerce Act governed the payment of allowances for private cars and vested the Commission with authority to find and declare what allowances are reasonable; that the Commission is compelled, under the statute, to ascertain, in the light of past and present experience, a fair and reasonable compensation to cover such costs and prescribe a uniform rate which will reflect such experience. (Id. 430.)

From the foregoing the Court deduced and announced the rule that the shipper in this case (Appellants) was entitled to be paid a reasonable allowance to be set forth in the published tariff, failing which the shipper may complain to the Commission to the end that such allowance may be made effective by a schedule duly published. (Id. 430.)

Continuing, the Court observed that since the published tariffs then in effect required that the mileage allowance should be paid according to "so-called reporting marks" and to the car owner, as distinguished from the car lessee, direct payment to the lessee shippers could not be made under the tariffs, but that the shipper lessees (Appellants) were entitled to be paid by the carrier a just and reasonable allowance for providing the tank cars, and that "no rule or regulation of the carrier may provide for the payment of such allowance to any other person."

Commenting upon the admitted fact that the shipper lessee was making a substantial profit on the leased cars, the Court observed that the Commission has jurisdiction of that matter and if it should appear that the shipper lessee is so profiting, "it might, in the light of all the facts, be found that the shipper is in the result obtaining transportation at a lower cost than others for the use of cars assigned by the carriers or on their own cars." (Id. 431.)

The decision then concluded with the statement that when it appeared in the course of the litigation that an administrative problem committed to the Commission was involved, the Court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act.

In light of its above-mentioned statements, this Court did not directly, or by inference, commit to the Interstate Commerce Commission the decision of the issues involved in the original assumpsit action; nor did it specifically point to the administrative questions open to the decision of the Commission.

Having determined that the car lease agreement was lawful, that the Car Company was a mere agent under the terms of that agreement to collect and pay over the mileage allowance, that Appellants had furnished the tank cars for the use of the carriers and were entitled, under the plain provisions of the statute, to receive the mileage allowance, except for the fact that the shipper lessee was precluded from collecting said allowance by reason of the restrictions in

the tariffs, but that such restrictions must give way to the provisions of Section 15(13) of the Act, the only questions remaining open for determination by the Commission were:

First, what allowance should be made as the maximum to the furnisher of tank cars as compensation under Section 15(13), in light of the fact that the present mileage allowance of one and one-half cents per car mile might, in the light of general experience, result in some shippers enjoying a profit and possibly transporting their commodities at a lesser rate than others; and

Second, whether the carriers should be required to eliminate from their tariffs or orders the prohibition against the payment of the allowance to a shipper lessee, as distinguished from a car owner.

Those questions could only be effectively determined as to the future. As stated by the Court, the then tariffs had been duly published and were effective and binding upon all carriers and shippers until changed by the Commission. If it would, the Commission could not have obviated those published tariffs retroactively, and, as admitted by counsel for Appellees in their briefs, the Commission could not have required adjustment of the tariffs or allowances over a past period by shippers or carriers. The only course open to the Commission, and what must, therefore, have been intended by this Court, was a full determination, upon investigation in the light of all the facts, of a just and reasonable allowance to be paid in the future and to be set forth in the published tariffs.

It may be said that this would have left the assumpsit action in the District Court undetermined. That is true, as was pointed out in the petition for rehearing filed at the time. But, as was said by this Court, the District Court had jurisdiction of the subject-matter and the parties, and the only issue was that arising from the defense tendered by the Car Company that the payment by it, in accordance with the lease agreement, of the mileage collected from the carriers would constitute a violation of the provisions of the Elkins Act. That issue involved a question of fact. To be sure, it concerned the effect of the future payments by the Car Company of mileage allowances improperly received by it and retained in breach of its agreement. This did not commit to the Commission the authority to decide whether previous payments made by the Car Company under the terms of the agreement constituted an undue preference of the Oil Works as a shipper or an unjust or unreasonable preference under the Act. That question was not in issue in the case and, as before stated, it was, in any case, a question of law peculiarly within the province of the Court.

The Commission's decision (R. 249) that Appellants were only entitled to receive the amount of the car rentals and that such an amount had been paid to them by the Car Company was, in effect, a decision that Appellants were not entitled to recover in the civil action. As before stated, the Commission had no such authority under the Constitution or the Interstate Commerce Act, and this Court did not transfer

to the Commission the authority of the District Court in respect to the civil action. Moreover, if, as counsel clair , the Commission was without authority to determine that further payments were due to Appellants under the agreement, it was equally without authority to determine as it did that such payments were not due. Counsel for Appellees in their pleadings in the lower Court and in their briefs in this Court assert that the Commission merely decided some questions involved in the assumpsit action and its decision was ancillary to the civil action and an authoritative guide for the District Court. If these contentions are correct, the Commission performed some of the functions of the civil Court and such action was beyond the authority of the Commission under the Constitution, the cognate statute and the previous decisions of this Court.

Opposing counsel claim that the decision of the Commission may be ignored or set aside by the One Judge District Court. It is inconceivable that unless the Commission's decision and order under attack is set aside, the One Judge District Court would not hold itself bound by that decision. The One Judge Court would not be warranted in setting aside the Commission's decision and order because that authority is vested only in a Three Judge Court under the provisions of the Urgent Deficiencies Act. As pointed out at page 13 of Appellants' brief on the motion to affirm, *Shannahan v. United States* and *Shields v. Utah-Idaho R. Co.*, which are cited by Appellees in support of their claim, do not recognize any such authority in the One Judge District Court.

G. THE COMMISSION'S FINDINGS AND ORDER THAT THE MAXIMUM COMPENSATION TO BE PAID BY THE CARRIERS SHOULD NOT EXCEED THE CAR RENTAL PAID BY THE SHIPPERS STEMS FROM AN ERRONEOUS VIEW OF THE LAW AND IN EFFECT IMPOSES UPON THE CARRIERS THE RESPONSIBILITY OF DETERMINING THE CAR RENTAL PAID BY A SHIPPER FOR EACH CAR FURNISHED TO THE CARRIERS. THIS PRECLUDES A UNIFORM ALLOWANCE AND THE DISCLOSURE THEREOF IN THE PUBLISHED TARIFFS AS REQUIRED BY SECTION 15(13) OF THE COMMERCE ACT.

The Commission's decision holds that car rentals vary as a result of competition and trade conditions. In its former decision (308 U.S. 422, supra), this Court also recognizes that fact. In complying with the finding under challenge, and the decision upon which it is based, the carriers would be required to determine at their peril in each instance the amount paid or payable by shipper lessees for each car furnished for transportation uses. Compliance with the order would not only open the door for preferences and discriminations, but strict compliance with the order would require the carriers to pay different mileage allowances to different shippers according to the difference in rentals paid by such shippers. This would constitute a violation of the express prohibition contained in Section 2 of the Interstate Commerce Act. In effect, the Commission has commanded the carriers to violate the express provisions of the Act. Compliance with this order would also render the carriers unable to establish and publish a uniform car allowance which is required under Section 15(13) of the Act. The order is therefore unlawful and in excess of the Commission's authority.

CONCLUSION.

For all of the reasons stated in the foregoing pages, the decision and order of the Commission, whether considered administrative or quasi-judicial or ancillary to the civil action, was without the scope of the Commission's authority and was not supported by the prerequisite evidence. The decision of the District Court should be therefore reversed and the order of the Commission annulled.

Dated, San Francisco, California,
March 11, 1946.

Respectfully submitted,
W. F. WILLIAMSON,
Counsel for Appellants.

WILLIAM B. MEAD,
WILLIAMSON & WALLACE,
Of Counsel.